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No. 92-37

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEE ALEXANDER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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15 pp

Table of Contents

Table of Authorities iii

ARGUMENT 2

I. THE DOCTRINE OF "FRAUD UPON THE COURT" URGED BY THE COMMISSIONER UPON THIS COURT HAS NO APPLICATION TO THE INSTANT CASE 2

II. THE DECISION OF THE TAX COURT WAS A LEGAL CONCLUSION AND NOT A DISCRETIONARY DECISION AS THE COURT OF APPEALS CONTENDED AND AS THE COMMISSIONER CONTENDS BEFORE THIS COURT ... 4

III. THE COURT OF APPEALS, AS DOES THE COMMISSIONER BEFORE THIS COURT, APPLIED THE WRONG STANDARD OF REVIEW TO THE DECISION OF THE TAX COURT..... 5

IV. ISSUES OF "TIMELINESS" AND "SUBSTANTIATION" URGED UPON THIS COURT BY THE COMMISSIONER SHOULD INSTEAD BE ADDRESSED TO THE TAX COURT, WHICH HAD NOT ENTERTAINED THEM, LEAVING TO THIS COURT THE ISSUE OF LAW IN CONFLICT BETWEEN THE FIRST AND SECOND CIRCUITS OF THE COURT OF APPEALS 7

V. THE COMMISSIONER ERRONEOUSLY ASSERTS TO THIS COURT THAT: "PETITIONER WAS INDICTED AND PLED GUILTY TO INCOME TAX EVASION (26 U.S.C. 7201) IN CONNECTION WITH THOSE RETURNS [1971-1985](Pet.App. A4-A6)".. 8

CONCLUSION 10

Table of Authorities

Cases	Page
Estate of Hall v. C. I. R., 967 F.2d 1437 (10th Cir. 1992)	6
Pacific First Federal Savings Bank v. C.I.R. 961 F.2d 800 (9th Cir. 1992)	7,8
Proctor and Gamble Co. v. C.I.R. 961 F.2d 1255 (6th Cir. 1992)	5

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REPLY BRIEF

ARGUMENT

I

THE DOCTRINE OF "FRAUD UPON THE COURT" URGED BY THE COMMISSIONER UPON THIS COURT HAS NO APPLICATION TO THE INSTANT CASE

The Court of Appeals based its affirmation of the decision of the Tax Court upon two cases: Monjar v. Commissioner, and Senate Realty Corp. v. Commissioner. (Pet. App. D-4, D-5). Neither case is applicable to the instant case. In both cases the time to appeal had expired and the motions to vacate the decisions of the Tax Court were filed, in the case of Monjar, 11 years following the decision of the Tax Court, and in the case of Senate, 9 months. Thus, the decisions of the Tax Court had become final and the motions of the petitioners could not be entertained by the Tax Court except for

"fraud upon the court".

In the instant case, petitioner filed his motion with the Tax Court 15 days before his time to file a petition for certiorari to review the decision of the Court of Appeals had expired and before the decision of the Tax Court had become final. Thus his motion could be entertained by the Tax Court on grounds other than "fraud upon the court".

Petitioner's application to the Tax Court was based on matters not expressly or implicitly part of the decision of the Court of Appeals and hence was not barred by law-of-the-case.

II

THE DECISION OF THE TAX COURT WAS A LEGAL CONCLUSION AND NOT A DISCRETIONARY DECISION AS THE COURT OF APPEALS CONTENDED AND AS THE COMMISSIONER CONTENDS BEFORE THIS COURT

The Tax Court's denial of petitioner's Rule 162 motion was a legal conclusion by the Tax Court that its decision became "final" immediately following its affirmation by the Court of Appeals and thus unalterable, even though the time to petition for certiorari had not expired. The insistence by the Court of Appeals that only "fraud on the court" would empower the Tax Court to alter its decision expresses a like conclusion by the Court of Appeals. Yet the Court of Appeals reviewed the decision of the Tax Court as if it were an exercise of the Tax Court's discretion.

And the Commissioner also contends the same before this court. The Tax Court had, in fact, determined a question of law.

III

THE COURT OF APPEALS, AS DOES THE COMMISSIONER BEFORE THIS COURT, APPLIED THE WRONG STANDARD OF REVIEW TO THE DECISION OF THE TAX COURT

The applicable standard of review of the question of law presented by the decision of the Tax Court (supra) is a de novo standard of review, not the abuse of discretion standard applied by the Court of Appeals and urged upon this Court as correct, by the Commissioner. "This court applies a de novo standard of review to legal conclusions made by the Tax Court. Smith v. Commissioner, 937 F.2d 1089, 1096 (6th Cir. 1991)"

Proctor and Gamble Co. v. C.I.R., 961

F.2d 1255, 1258 (6th Cir. 1992)

"If on appeal [from the Tax Court] the court is asked to reconsider a question of law, the applicable standard is a de novo review. Helbering v. Tex-Penn Oil Co., 300 U.S. 481, 57 S.Ct. 569, 81 L.Ed. 755 (1937)"

Estate of Hall v. C.I.R., 967 F.2d 1437, 1438 (10th Cir. 1992)

"Some of our earlier decisions, however, appear to indicate that deference should be given to decisions of the Tax Court. In Vukasovich, Inc. v. Commissioner, 790 F.2d 1409, 1411-13 (9th Cir. 1986), we recognized the difficulty with some of our previous decisions and concluded that, in general, no special deference should be given the Tax Court when reviewing a pure question of law. See also Lynch v. Commissioner, 801 F.2d 1176, 1178-79 (9th

Cir. 1986) (no deference tax court's conclusions of law). This interpretation of our circuit's case law history was followed in Estate of Schnack, 848 F.2d at 935."

Pacific First Federal Savings Bank v. C.I.R., 961 F.2d 800, 803 (9th Cir. 1992).

IV

ISSUES OF "TIMELINESS" AND "SUBSTANTIATION" URGED UPON THIS COURT BY THE COMMISSIONER SHOULD INSTEAD BE ADDRESSED TO THE TAX COURT, WHICH HAD NOT ENTERTAINED THEM, LEAVING TO THIS COURT THE ISSUE OF LAW IN CONFLICT BETWEEN THE FIRST AND SECOND CIRCUITS OF THE COURTS OF APPEALS

""Uniformity among the circuits is especially important in tax cases to insure equal and certain administration of the tax system. We would therefore hesitate to reject the view of another circuit." First Charter Financial Corp. v. United

States, 690 F.2d 1342, 1345 (9th Cir. 1982)."

Pacific First Federal Savings Bank v. C.I.R., 961 F.2d 800, 803 (9th Cir. 1992)

V

THE COMMISSIONER ERRONEOUSLY ASSERTS TO THIS COURT THAT: "PETITIONER WAS INDICTED AND PLED GUILTY TO INCOME TAX EVASION (26 U.S.C. 7201) IN CONNECTION WITH THOSE RETURNS [1971-1985]"

Petitioner did not plead guilty to income tax evasion for the years 1979-1985 as the Commissioner's brief asserts at Page 2. Petitioner pled guilty to only the tax year 1985 (Pet. App. A4-A6). The petitioner did not plead guilty to any other year because the funds received during his tenure in office were collected for political campaigns and were not income

to this petitioner. In fact, they were a segregated fund maintained, by in large, by the fund raisers. None of the funds was spent for personal purposes, except for withdrawals for family support which petitioner's accountant regrettably masked as loans and for which this petitioner, per force, accepted responsibility and pled guilty to for the year 1985. At the time of his plea, petitioner delivered all of the funds collected to the government virtually intact.

The Commissioner argues the merits of the case to this court, overlooking the fact that petitioner has not been given the opportunity to contest the Commissioner's claim inasmuch as the Commissioner actively resists the petitioner's access to the Tax Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEE ALEXANDER, Pro Se
Petitioner

September, 1992